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No. 02-1624

IN THE

Supreme Court of the United States

ELK GROVE UNIFIED SCHOOL DISTRICT AND
DAVID W. GORDON, SUPERINTENDENT, EGUSD,
Petitioners,

v.

MICHAEL A. NEWDOW,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR UNITED STATES SENATORS JOHN CORNYN, JON KYL, LINDSEY O. GRAHAM, LARRY E. CRAIG, AND SAXBY CHAMBLISS, CHAIRMAN AND MEMBERS OF THE SENATE SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND PROPERTY RIGHTS, AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

This brief will address the following question:

Whether a public school district policy that requires teachers to lead willing students in reciting the Pledge of Allegiance, which includes the words "under God," violates the Establishment Clause of the First Amendment, as applicable through the Fourteenth Amendment.

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BRIEF FOR UNITED STATES SENATORS JOHN CORNYN, JON KYL, LINDSEY O. GRAHAM, LARRY E. CRAIG, AND SAXBY CHAMBLISS, CHAIRMAN AND MEMBERS OF THE SENATE SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND PROPERTY RIGHTS, AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICUS CURIAE[1]

John Cornyn, Jon Kyl, Lindsey O. Graham, Larry Craig, and Saxby Chambliss are members of the United States Senate currently serving in the One Hundred Eighth Congress. Senator Cornyn is Chairman of the Senate Judiciary Subcommittee on the Constitution, Civil Rights and Property Rights. Senators Kyl, Graham, Craig, and Chambliss are members of the subcommittee. The Senators who join this brief possess a diversity of views on a variety of subjects, including matters of constitutional law.[2] Yet all have voted in support of the Pledge of Allegiance and the voluntary recitation of the Pledge in public schools across the nation as a commendable expression of patriotism and love of country, consistent with the Constitution of the United States. *See, e.g.*, S. Res. 292 (107th Cong.); Pub. L. No. 107-293, 116 Stat. 2057 (2002); S. Res. 71 (108th Cong.).

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[1] Pursuant to Rule 37.6, amicus certifies that no counsel for a party authored this brief in whole or in part, and that no person or entity, other than the amicus, its members, or counsel, has made a monetary contribution to this brief's preparation or submission. This brief is filed with the consent of the parties, and letters indicating such consent have been filed with the Court.

[2] For example, as Attorney General for the State of Texas, Cornyn defended the exercise of voluntary, student-led prayer at public football games as consistent with the requirements of the First and Fourteenth Amendments, in *Santa Fe Ind. Sch. Dist. v. Doe*, 530 U.S. 290 (2000). That position did not ultimately prevail.

INTRODUCTION AND SUMMARY OF ARGUMENT

Respondent Michael Newdow is an atheist whose daughter attends a public elementary school administered by petitioners Elk Grove Unified School District, a public school district in the state of California, and David W. Gordon, the district's superintendent. Pet. App. 3. Mr. Newdow filed suit in federal district court to challenge the constitutionality of the Pledge of Allegiance and a school district policy that requires teachers to lead willing students in reciting the Pledge.[3] The policy was promulgated pursuant to the California Education Code, which states that public schools shall begin each school day with "appropriate patriotic exercises," and that recitation of the Pledge shall satisfy that requirement. Cal. Educ. Code § 52720 (1989).[4]

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[3] That policy provides for the *voluntary* recitation of the Pledge. By contrast, this Court held in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), that *compelling* students to recite the Pledge violates the First and Fourteenth Amendments.

[4] Specifically, the California Education Code provides in pertinent part:

> § 52720. Daily performance of patriotic exercises in public schools
>
> In every public elementary school each day during the school year at the beginning of the first regularly scheduled class or activity period at which the majority of the pupils of the school normally begin the schoolday, there shall be conducted appropriate patriotic exercises. The giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy the requirements of this section.
>
> In every public secondary school there shall be conducted daily appropriate patriotic exercises. The giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy such requirement. Such patriotic exercises for secondary schools shall be conducted in accordance with the regulations which shall be adopted by the governing board of the district maintaining the secondary school.

Notwithstanding the state's characterization of the Pledge of Allegiance as an appropriate *patriotic* exercise, Mr. Newdow maintains that the district's Pledge policy violates the Establishment Clause of the First Amendment, as applied to the states through the Fourteenth Amendment. U.S. Const. amends. I, XIV. The Establishment Clause provides that "Congress shall make no law respecting an establishment of *religion*." U.S. Const. amend. I (emphasis added). The Fourteenth Amendment, in turn, has been construed by this Court to extend the substantive requirements of the Establishment Clause to the states.[5] Central to respondent's claim that the school district's policy of voluntary recitation of the Pledge violates the Establishment Clause is the fact that, in 1954, Congress added the words "under God" to the Pledge.

The district court dismissed the case on the merits. But on June 26, 2002, a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit, by a 2-1 vote, reversed the district court, and found the school district's policy unconstitutional under the Establishment Clause.[6]

The response of the United States Senate was unequivocal and unanimous, extraordinarily swift, and profoundly critical. On the very same day the Ninth Circuit

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[5] *See, e.g., Everson v. Board of Ed. of Ewing*, 330 U.S. 1, 14-15 (1947).

[6] The panel also struck down as unconstitutional the Pledge itself – by invalidating the 1954 act of Congress that added the words "under God" to the Pledge. That particular holding, however, was withdrawn when the Ninth Circuit issued its amended opinion on February 28, 2003.

issued its first panel opinion, all 100 Senators co-sponsored Senate Resolution 292 to express strong support for the Pledge of Allegiance and "strong[] disapprov[al]" of the Ninth Circuit ruling. The resolution expressly recognized that the United States "was founded on religious freedom by founders, many of whom were deeply religious," and that our nation was indeed "established as a union 'under God,'" as the Pledge makes clear.

The resolution noted that "the First Amendment to the Constitution embodies principles intended to guarantee freedom of religion both through the free exercise thereof and by prohibiting the government establishing a religion." The resolution then reconciled the requirements of the First Amendment with Congress's earlier codification of the Pledge of Allegiance, by characterizing the Pledge as a "constitutional[] . . . expression of patriotism" – and not as an impermissible establishment of religion. The Senate unanimously approved the resolution that same day.

In addition, the Senate unanimously approved legislation later that year to reaffirm and recodify the entirety of the Pledge of Allegiance – including the 1954 addition of the words "under God." *See* Pub. L. No. 107-293, § 2, 116 Stat. 2057, 2060 (2002).[7] That action should have removed any

[7] Section 4 of title 4 of the United States Code thus continues to read as follows:

> § 4. Pledge of allegiance to the flag; manner of delivery
>
> The Pledge of Allegiance to the Flag: "I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.", should be rendered by standing at attention facing the flag with the right hand over the heart. When not in uniform men should remove any non-religious headdress with their right hand and hold it at the left shoulder, the hand being over the heart. Persons in uniform should remain silent, face the flag, and render the military salute.

and all doubt that the Pledge of Allegiance is an expression of patriotism and love of country, and not a prayer or other exercise of religious faith.

Yet, notwithstanding these Senate actions – indeed, without even *acknowledging* these Senate actions – the Ninth Circuit denied en banc reconsideration on February 28, 2003. That denial of reconsideration was particularly remarkable in light of the Senate's unanimous view that nothing in the Pledge of Allegiance, or in the school district's policy, violates the Establishment Clause or any other provision of the Constitution. And on March 4, 2003, the Senate approved yet another unanimous resolution, Senate Resolution 71, again supporting the Pledge and re-registering its "strong[] disapprov[al]" of the Ninth Circuit's ruling.

The Establishment Clause jurisprudence of this Court, to be sure, has come into sharp and frequent criticism over the years for its notorious failure to provide lower courts with the guidance and the clear, stable, and administrable rules necessary to deal with the burgeoning caseload in this thorny area of law.[8] The Senators who join this brief have at various

[8] *See, e.g.*, Geoffrey R. Stone, *O.T. 1983 and the Era of Aggressive Majoritarianism: A Court in Transition*, 19 Ga. L. Rev. 15, 24 (1984) (criticizing the Court's failure "to articulate a clear, precise, or predictable rule" in its Establishment Clause cases); Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools – An Update*, 75 Cal. L. Rev. 5, 6 (1987) (describing Court's Establishment Clause jurisprudence as "a conceptual disaster area"); Ken Greenawalt, *Quo Vadis: The Status and Prospects of "Tests" Under the Religion Clauses*, 1995 Sup. Ct. Rev. 323, 361 (characterizing the Court's Establishment Clause jurisprudence as a "morass"); Marci A. Hamilton, *Power, The Establishment Clause, and Vouchers*, 31 Conn. L. Rev. 807, 824-25 (1999) ("The Supreme Court's doctrine in the Establishment Clause arena has

times spoken favorable or unfavorably of various Supreme Court decisions in the Establishment Clause area.

That said, the Senators who join this brief are united in their belief that the Pledge of Allegiance, as well as the school district's policy providing for voluntary recitation of the Pledge, are perfectly permissible expressions of patriotism, and are not exercises of religious faith whatsoever. Whatever one might say about the Court's existing Establishment Clause jurisprudence with respect to the private exercise of religious faith in the public square, that controversial body of judicial precedent simply has nothing to do with the particulars of *this* case, which simply involves patriotic expressions of support for this nation and its religious heritage.[9]

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been treated to more internal and external criticism for its lack of consistency, perhaps, than any other constitutional doctrine.").

Federal appellate judges have similarly bemoaned the Court's steadfast refusal to issue clear rules and guidance in this area. *See, e.g., Sep. of Church and State Comm. v. City of Eugene*, 93 F.3d 617, 622 (9th Cir. 1996) (O'Scannlain, J., concurring) (noting the Court's "fractured and incoherent doctrinal path" in the Establishment Clause area); *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 282 (5th Cir. 1996) (Jones, J., dissenting from denial of rehearing en banc) (complaining that this Court's Establishment Clause jurisprudence "more closely resemble ad hoc Delphic pronouncements than models of guiding legal principles"). Indeed, this Court itself has recognized that its Establishment Clause jurisprudence at times "sacrifices clarity and predictability for flexibility." *Committee for Public Ed. and Religious Liberty v. Regan*, 444 U.S. 646, 662 (1980). *See also Edwards v. Aguillard*, 482 U.S. 578, 639 (1987) (Scalia, J., dissenting) (bemoaning the Court's "embarrassing Establishment Clause jurisprudence").

[9] Accordingly, we disagree with organizations like the American Civil Liberties Union and Americans United for Church and State, which have expressed agreement with the court below. *See, e.g., ACLU Responds to Appeals Court Ruling on Pledge of Allegiance*,

Accordingly, this Court should reverse the decision of the Ninth Circuit and uphold both the Pledge of Allegiance and the school district's policy providing for the voluntary recitation of the Pledge. Petitioners' brief, as well as the briefs of other amici, will amply demonstrate the constitutionality of the Pledge under the variety of tests, standards, and passages that can be found in this Court's numerous precedents.[10] This brief will therefore instead

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June 26, 2002, *available at* archive.aclu.org/news/2002/n062602b.html ("[W]e believe the court's finding was correct and is consistent with recent Supreme Court rulings invalidating prayer at school events."); Tony Mauro, *Newdow Says Civil Rights Groups of Little Help in Case*, Legal Times, Nov. 10, 2003, *available at* www.law.com/jsp/newswire_article.jsp?id=1067351006147 ("Barry Lynn, executive director of Americans United, . . . says his organization is foursquare behind Newdow's effort.").

[10] *See, e.g., Engel v. Vitale*, 370 U.S. 421, 440 n.5 (1962) (Douglas, J., concurring) ("The Pledge of Allegiance . . . in no way run[s] contrary to the First Amendment but recognize[s] only the guidance of God in our national affairs.") (quotations and citations omitted); *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 304 (1963) (Brennan, J., concurring) ("The reference to divinity in the revised pledge of allegiance . . . may merely recognize the historical fact that our Nation was believed to have been founded 'under God.' Thus reciting the pledge may be no more of a religious exercise than the reading aloud of Lincoln's Gettysburg Address, which contains an allusion to the same historical fact."); *Lynch v. Donelly*, 465 U.S. 668, 676 (1984) ("There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789 . . . [E]xamples of reference to our religious heritage are found . . . in the language 'One Nation under God,' as part of the Pledge of Allegiance to the American flag. That pledge is recited by many thousands of public school children – and adults – every year."); *Wallace v. Jaffree*, 472 U.S. 38, 78 n.5 (1985) (O'Connor, J., concurring) ("In my view, the words 'under God' in the Pledge . . . serve as an acknowledgment of religion with 'the legitimate

focus on two separate arguments. *First*, as a patriotic rather than religious exercise, the voluntary recitation of the Pledge cannot possibly fall within the prohibition of the Establishment Clause, however that provision might be construed in the precedents of this Court. After all, references to God can be found in every one of our founding documents, in our National Anthem and National Motto, and on our public buildings and official currency. Appeals to our Creator can be heard at the commencement of every daily session of the Senate and the House of Representatives, and in state and federal courts across this great land. Logic and reason dictate that these commonplace and customary references to the Almighty, found in the basic civic documents and institutions of our nation, do not establish an official state religion in violation of the First Amendment, any more or less than does the reference to God that is contained in the Pledge of Allegiance. *Second*, any doubt about the patriotic nature of the Pledge as a nonreligious expression of love of country was eliminated when Congress reaffirmed and recodified the Pledge in its entirety, with the unanimous support of the Senate, in the months following the original Ninth Circuit panel decision invalidating the Pledge. *See* Pub. L. No. 107-293, 116 Stat. 2057 (2002). That act established beyond cavil that the voluntary recitation of the Pledge of Allegiance in public schools across the nation is a patriotic and not a religious act.

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secular purposes of solemnizing public occasions, [and] expressing confidence in the future."); *County of Allegheny v. ACLU*, 492 U.S. 573, 602-3 (1989) ("Our previous opinions have considered in dicta the motto and the pledge, characterizing them as consistent with the proposition that government may not communicate an endorsement of religious belief."); *see also Sherman v. Community Consolidated Sch. Dist. 21*, 980 F.2d 437 (7th Cir. 1992) (upholding constitutionality of school district policy providing for voluntary recitation of the Pledge).

ARGUMENT

I. AS A PATRIOTIC RATHER THAN RELIGIOUS EXERCISE, THE VOLUNTARY RECITATION OF THE PLEDGE CANNOT POSSIBLY FALL WITHIN THE PROHIBITION OF THE ESTABLISHMENT CLAUSE.

In *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), a case involving the *compulsory* recitation of the Pledge of Allegiance, this Court noted that "the State may require teaching by instruction and study of all in our history and in the structure and organization of our government, including the guarantees of civil liberty which tend to inspire patriotism and love of country." *Id.* at 631 (quotations and citations omitted). Drawing a "sharp[]" contrast between voluntary and compulsory recitations of the Pledge, this Court recognized "[n]ational unity as an end which officials may foster by persuasion and example." *Id.* at 638, 640. *See also id.* at 641 (endorsing "patriotic ceremonies" so long as they are "voluntary"). Accordingly, it has long seemed clear – at least until the ruling of the Ninth Circuit below – that the voluntary recitation of the Pledge of Allegiance by public school children across this land is a patriotic, worthy, and beneficial activity, and in no way constitutionally objectionable.

Respondent Newdow objects on the basis of the two words that distinguish the Pledge at issue in the *Barnette* case and the Pledge at issue today. On June 22, 1942, Congress first codified the Pledge as "I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation indivisible, with liberty and justice for all." Pub. L. No. 623, Ch. 435, § 7, 56 Stat. 377, 380 (1942) (codified at 36 U.S.C. § 1972). Twelve years later – and eleven years after this Court decided *Barnette* – Congress amended section 1972 to add the words "under God" after

the words "one Nation." Pub. L. No. 396, Ch. 297, 68 Stat. 249 (1954).[11]

The addition of the words "under God" to the Pledge of Allegiance created no new constitutional infirmities. As modified – dare we say, improved – in 1954, the Pledge simply acknowledges various fundamental principles upon which our nation was founded over two centuries ago:

> I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation *under God*, *indivisible*, with *liberty* and *justice* for all.

4 U.S.C. § 4 (emphasis added). In thirty-one elegant words, the Pledge reiterates and reinforces certain foundational principles that have become essential to the American character: national unity (at first, against an oppressive British regime; and then later, against seccessionist inclinations successfully put down during the Civil War), liberty and justice for all Americans, and the importance of religious faith in our nation's heritage.

The inclusion of this third element – recognizing the foundational importance of faith to the birth, development, and on-going prosperity of our nation – is hardly unique to the Pledge of Allegiance. As Congress noted in findings unanimously approved by the Senate in 2002:

> (1) On November 11, 1620, prior to embarking for the shores of America, the Pilgrims signed the Mayflower Compact that declared: "Having undertaken, for the Glory of God and the advancement of the Christian Faith and honor of our

[11] Title 36 was later revised and recodified by Pub. L. No. 105-225, § 2(a), 112 Stat. 1253, 1494 (1998). The Pledge now appears in title 4 of the United States Code. *See* 4 U.S.C. § 4.

> King and country, a voyage to plant the first colony in the northern parts of Virginia,".
>
> * * *
>
> (3) In 1781, Thomas Jefferson, the author of the Declaration of Independence and later the Nation's third President, in his work titled "Notes on the State of Virginia" wrote: "God who gave us life gave us liberty. And can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are of the Gift of God. That they are not to be violated but with His wrath? Indeed, I tremble for my country when I reflect that God is just; that his justice cannot sleep forever.".
>
> (4) On May 14, 1787, George Washington, as President of the Constitutional Convention, rose to admonish and exhort the delegates and declared: "If to please the people we offer what we ourselves disapprove, how can we afterward defend our work? Let us raise a standard to which the wise and the honest can repair; the event is in the hand of God!".
>
> (5) On July 21, 1789, on the same day that it approved the Establishment Clause concerning religion, the First Congress of the United States also passed the Northwest Ordinance, providing for a territorial government for lands northwest of the Ohio River, which declared: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.".
>
> (6) On September 25, 1789, the First Congress unanimously approved a resolution calling on President George Washington to proclaim a National Day of Thanksgiving for the people of the United

States by declaring, "a day of public thanksgiving and prayer, to be observed by acknowledging, with grateful hearts, the many signal favors of Almighty God, especially by affording them an opportunity peaceably to establish a constitution of government for their safety and happiness.".

(7) On November 19, 1863, President Abraham Lincoln delivered his Gettysburg Address on the site of the battle and declared: "It is rather for us to be here dedicated to the great task remaining before us--that from these honored dead we take increased devotion to that cause for which they gave the last full measure of devotion--that we here highly resolve that these dead shall not have died in vain--that this Nation, under God, shall have a new birth of freedom--and that Government of the people, by the people, for the people, shall not perish from the earth.".

Pub. L. No. 107-293, § 1, 116 Stat. 2057-58 (2002).[12]

References to the Almighty can also be found in the Declaration of Independence and the Constitution of the United States, the two documents that have historically marked us as a separate people, distinct from other nations on this Earth, and the two documents upon which our nation was founded. The Constitution explicitly refers to "the Year of our Lord." U.S. Const. art. VII. The Declaration of Independence cites "the Laws of Nature and of Nature's God" as authority for "dissolv[ing] the political bands" between the American colonies and the British empire, and

[12] It has been noted that the words "under God" found in the Pledge were actually derived from President Lincoln's Gettysburg Address. *See also* James Piereson, *"Under God": The history of a phrase*, Weekly Standard, Oct. 27, 2003, at 19-23 (outlining the historical lineage of the phrase "under God" and tracing it back ultimately to George Washington).

famously recognizes as "self-evident" truths "that all men are created equal, that they are endowed by their Creator with certain unalienable Rights."

Congress required the U.S. Mint to place the words "In God We Trust" on all currency, 31 U.S.C. § 5114(b), in 1955 – the year after it added the words "under God" to the Pledge of Allegiance. Pub. L. No. 140, Ch. 303, 69 Stat. 290 (1955). In 1956, Congress codified our National Motto, Pub. L. No. 851, Ch. 795, 70 Stat. 732 (1956), which contains four simple words: "In God we trust." 36 U.S.C. § 302.[13] And our National Anthem, the Star-Spangled Banner, 36 U.S.C. § 301(a), paraphrases our national motto in its fourth stanza: "In God is our trust."

References to God can also be found on numerous public buildings – including the U.S. Supreme Court building. And appeals to our Creator can be heard at the commencement of every daily session of the Senate and the House of Representatives, and in courts across this great land. According to press accounts, respondent Newdow objects on constitutional grounds to all of these civic statements, including the recitations that open sessions of this very Court, because they include a reference to "God."[14] Yet this Court

[13] *See also Gaylor v. United States*, 74 F.3d 214 (10th Cir. 1996) (rejecting constitutional challenge to National Motto and U.S. currency on Establishment Clause grounds); *O'Hair v. Murray*, 588 F.2d 1144 (5th Cir. 1979) (same); *Aronow v. United States*, 432 F.2d 242 (9th Cir. 1970) (same).

[14] *See* Tony Mauro, *The Man Behind the Pledge Case*, Legal Times, Nov. 10, 2003, *available at* www.law.com/jsp/newswire_article.jsp?id=1067351005985:

> [Newdow] says that the day after he wins, he will launch a challenge against other everyday government-sponsored mentions of God as well. He already has challenges pending against congressional chaplains and the Rev.

has already found that such references to God – like that contained in the Pledge[15] – do not establish a national religion.[16]

Accordingly, the inclusion of the words "under God" need not, and do not, detract from our long-held understanding of the Pledge of Allegiance as an expression of patriotism and love of country, and not as an exercise of

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Franklin Graham's invocation, full of Christian references, at President George W. Bush's 2001 inauguration.

"Remember, when I argue this case, I will be walking into a Court where the marshal says, 'God save this honorable Court,'" he notes. "I should challenge that."

[15] *See* note 10.

[16] *See, e.g., Zorach v. Clauson*, 343 U.S. 306, 312-13 (1952):

> The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other--hostile, suspicious, and even unfriendly. Churches could not be required to pay even property taxes. Municipalities would not be permitted to render police or fire protection to religious groups. Policemen who helped parishioners into their places of worship would violate the Constitution. Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; "so help me God" in our courtroom oaths--these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: "God save the United States and this Honorable Court."

religious faith. *See also* Cal. Educ. Code § 52720 (1989) (noting that recitation of the Pledge of Allegiance is an "appropriate patriotic exercise"). The Ninth Circuit thus plainly erred when it described the Pledge, as amended in 1954, as a "profession of a religious belief, namely, a belief in monotheism." Pet. App. 11-12.

The court below began its substantive analysis by summarizing the three tests that this Court has heretofore developed for determining whether a violation of the Establishment Clause has occurred. As the Ninth Circuit explained, this Court has intermittently employed three interrelated tests over the past three decades: (1) the three-prong test set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971); (2) the "endorsement" test first articulated by Justice O'Connor in *Lynch v. Donnelly*, 465 U.S. 668 (1984), and later adopted by the Court in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989); and (3) the "coercion" test first used by this Court in *Lee v. Weisman*, 505 U.S. 577 (1992). None of those tests are violated by the school district's policy providing for the voluntary recitation of the Pledge of Allegiance, because those tests apply to government actions with respect to exercises of religious faith, and not with respect to expressions of patriotism.

It is emphatically an act of patriotism, and not an act of religious faith, to pledge one's allegiance to the United States, and to the flag that represents this nation. Perhaps the most striking example: The Pledge of Allegiance customarily plays an important role in naturalization ceremonies, as a symbolic expression of the allegiance to the United States that is newly pledged by individuals who were at one time foreigners to this country – individuals who come from religious devotions and faiths as diverse as this world has to offer. *See also* Pet. App. 78 ("The Pledge is recited not just in schools but also at various official events and public ceremonies, including perhaps the most patriotic of occasions—naturalization ceremonies."). Likewise, *failure*

of allegiance to the United States has long constituted legal grounds for expatriation, regardless of the nature of the expatriate's religious faith. *See* 8 U.S.C. § 1481.

In short, it is no exercise of religious faith simply to recognize that this nation was founded on the basis of a number of principles, among which include an acknowledgement of the fundamental importance of faith. It is simply a recognition of what it means to be an American.

II. ANY DOUBT ABOUT THE PATRIOTIC, RATHER THAN RELIGIOUS, NATURE OF THE PLEDGE WAS REMOVED BY PUBLIC LAW 107-293.

Various passages in the lower court opinion at least suggest that it was specifically the 1954 decision by Congress to *add* the words "under God" to the Pledge – rather than the mere fact that those words are included in the Pledge today – that gave rise to the constitutional infirmity identified by the Ninth Circuit.

The opening paragraph of the court's opinion characterizes respondent's argument as follows: "the *addition of these words* ["under God"] by a 1954 federal statute to the previous version of the Pledge of Allegiance (which made no reference to God) and the daily recitation in the classroom of the Pledge of Allegiance, *with the added words included*, by his daughter's public school teacher are violations of the Establishment Clause." Pet. App. 2-3 (emphasis added). And the opinion concludes that "the school district's policy and practice of teacher-led recitation of the Pledge, *with the inclusion of the added words 'under God,'* violates the Establishment Clause." Pet. App. 17 (emphasis added).

These passages might have been crafted reminiscent of this Court's ruling in *Wallace v. Jaffree*, 472 U.S. 38 (1985). In 1978, the state of Alabama had enacted a statute authorizing a one-minute period of silence in all public schools "for meditation." In 1981, however, the Alabama

legislature crafted a new statute which authorized a period of silence "for meditation *or voluntary prayer*" (emphasis added). This Court concluded that the addition of the words "or voluntary prayer" violated the Establishment Clause because it impermissibly gave specific endorsement to religious activity, above other activities. As the Court explained, "[t]he addition of 'or voluntary prayer' indicates that the State intended to characterize prayer as a favored practice. Such an endorsement is not consistent with the established principle that the government must pursue a course of complete neutrality toward religion." *Id.* at 60.

Writing in dissent, Chief Justice Burger noted that the Court's analysis in *Jaffree* threatened to invalidate the Pledge of Allegiance. As he explained:

> Congress amended the statutory Pledge of Allegiance 31 years ago to add the words "under God." Do the several opinions in support of the judgment today render the Pledge unconstitutional? That would be the consequence of their method.

Id. at 88 (Burger, C.J., dissenting) (citation omitted).

Of course, Justice O'Connor responded to this concern in *Jaffree* itself. As she stated in her concurring opinion:

> THE CHIEF JUSTICE suggests that one consequence of the Court's emphasis on [the addition of the words "or voluntary prayer"] might be to render the Pledge of Allegiance unconstitutional because Congress amended it in 1954 to add the words "under God." I disagree. In my view, the words "under God" in the Pledge . . . serve as an acknowledgment of religion with the legitimate secular purposes of solemnizing public occasions, and expressing confidence in the future.

Id. at 78 n.5 (O'Connor, J., concurring) (quotations, citations, and alterations omitted).

If nothing else, however, Congress took a series of actions in 2002 which clearly renders the *Jaffree* analysis inapplicable to the instant case. On the same day that the three-judge panel of the Ninth Circuit issued its first opinion invalidating the school district's policy providing for the voluntary recitation of the Pledge of Allegiance, all 100 Senators co-sponsored Senate Resolution 292 to express strong support for the Pledge and "strong[] disapprov[al]" of the Ninth Circuit decision. The terms of that resolution make clear that the inclusion of the words "under God" was not intended to endorse religious activity *per se*, but rather to bolster and strengthen the original purpose of the Pledge – to express patriotism and love of country, and to recognize the importance of faith as one of the fundamental principles upon which this nation was founded.

First, the resolution expressly recognized that the United States "was founded on religious freedom by founders, many of whom were deeply religious," and that our nation was indeed "established as a union 'under God,'" as the Pledge makes clear. Second, the resolution noted that "the First Amendment to the Constitution embodies principles intended to guarantee freedom of religion both through the free exercise thereof and by prohibiting the government establishing a religion." Finally, the resolution reconciled the requirements of the First Amendment with the reference to the Almighty in the Pledge, by characterizing the Pledge as a "constitutional[] . . . expression of patriotism" – and not as an unconstitutional establishment of religion. The Senate unanimously approved the resolution that same day.

The very next day, the House of Representatives adopted language similar to the Senate resolution, when it approved House Resolution 459. That resolution stated that "the Pledge of Allegiance is the verbal expression of support for the United States of America" – and "is not a prayer or a religious practice." The Pledge "is not a religious service or a prayer, but it is a statement of historical beliefs. The

Pledge of Allegiance is a recognition of the fact that many people believe in God and the value that our culture has traditionally placed on the role of religion in our founding and our culture. . . . [T]he Pledge . . . reflects the historical fact that a belief in God permeated the founding and development of our Nation." The House approved the resolution by an overwhelming 416-3 vote.

It was against this backdrop that, a few months later, Congress enacted, with the unanimous approval of the Senate,[17] legislation to "reaffirm[]" and recodify the entirety of the Pledge of Allegiance – including the 1954 addition of the words "under God." *See* Pub. L. No. 107-293, § 2, 116 Stat. 2057, 2060 (2002). That same act also directed the Office of the Law Revision Counsel to "show in the historical and statutory notes that the 107th Congress reaffirmed the exact language that has appeared in the Pledge for decades." *Id.*[18] This act thus removed any and all doubt that the Pledge has always served as an expression of patriotism, love, and support for this country, and not as a prayer or other form of religious exercise, even after the words "under God" were added to the Pledge in 1954.

By enacting this legislation, Congress confirmed what Americans know instinctively: that the Pledge of Allegiance was designed for all Americans, regardless of religious faith, to express their devotion and allegiance to this great nation, founded upon a commitment to religious liberty and justice for all.

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

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[17] The House approved the act by an overwhelming vote of 401-5.

[18] Congress took similar action to protect the National Motto from constitutional attack. *See id.*, § 3.

Respectfully submitted.

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